No. 86-228

In The

Supreme Court of the United States

October Term, 1986

JUOZAS KUNGYS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Which, if any, of the several conflicting and divergent formulations interpreting the "second prong" of *Chaunt v. United States*, 364 U.S. 350 (1960), governs the heavy burden of proving a "material" misrepresentation in order to denaturalize a citizen?

2. As still unresolved by this Court, whether the same test or tests of materiality for revoking citizenship applies to the invalidation of a visa?

3. Whether the Third Circuit Court of Appeals misconstrued the Government's heavy burden of proving the materiality of a misrepresentation by clear, convincing and unequivocal evidence, when it held that the Government, under the second prong of *Chaunt*, need only establish a mere "probability" that an investigation would have revealed an independent "disqualifying fact" making the petitioner ineligible for a visa had the petitioner made truthful statements as to what it held were his immaterial date and place of birth under the first prong of *Chaunt*?

4. Whether the Third Circuit's standard of plenary review, pursuant to which it made *de novo* findings and drew inferences as to unalleged "facts" directly contrary to the findings of the District Court and to the record, on whether an investigation would have ensued and whether the petitioner was ineligible for a visa, violated Rule 52(a) of the Federal Rules of Civil Procedure and deprived the petitioner of his constitutional right to due process of law?

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The petitioner, Juozas Kungys, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above entitled proceeding on June 20, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is still unreported but is printed as Appendix A.

The opinion of the United States District Court for the District of New Jersey (Debevoise, D.J.) is reported at 571 F. Supp. 1104 (App. C).

JURISDICTION

The judgment of the Court of Appeals reversing the judgment of the District Court dismissing the complaint and remanding for denaturalization proceedings was entered on June 20, 1986 (App. B). Jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 340(a) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1451(a) provides for revocation of a naturalized citizen's order and certificate of naturalization if they "were procured by concealment of a material fact or by willful misrepresentation" (App. D).

STATEMENT OF THE CASE

In January 1947 petitioner, then a refugee, applied to the U. S. Consulate in Stuttgart, Germany for a non-preference Quota Immigration Visa under the quota for Lithuania and in his visa application falsely stated he was born on October 4, 1913 in Kaunas, Lithuania, when in fact he was born on September 21, 1915 in Reistru, Lithuania. In support of those statements, petitioner submitted, *inter alia*, a certificate of the "Ex-Political Prisoners Committee" (Trial Exh. A-2) containing the incorrect date and place of birth and certifying that he took an active part in the Lithuanian anti-Nazi resistance movement and was persecuted by the Nazis. The District Court expressly found that the Government did not meet its burden of proof that petitioner's

participation in the anti-Nazi resistance was not true.[1]

On March 4, 1948, the U. S. Consulate at Stuttgart issued to petitioner Quota Immigration Visa No. 114 pursuant to the provisions of the Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153, as amended. Petitioner entered the United States on April 29, 1948 upon presentation of that visa.

On October 23, 1953 petitioner executed a Petition for Naturalization (Form N-405) (Trial Exh. A-11) and again made the same misrepresentation as to his date and place of birth.

On February 3, 1954, the United States District Court for the District of New Jersey granted the petition for naturalization and issued to him a Certificate of Naturalization (Trial Exh. A-12).

On July 22, 1981 the Office of Special Investigations of the Criminal Division of the U. S. Justice Department ("the OSI") filed a five count complaint in the United States District Court for the District of New Jersey seeking to revoke petitioner's citizenship on the grounds, *inter alia,* that petitioner illegally procured his citizenship because of alleged acts of persecution and that he had made misrepresentations and concealments of material facts with respect to his date and place of birth. The

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1. "7. Professor Finger also testified that in January 1947 under applicable regulations a visa applicant who had no close relatives in the United States was not eligible for a visa unless he could prove that he was a victim of Nazi persecution. The testimony and regulations in evidence in this case suggest that Professor Finger was in error on this point, although perhaps there was an informal policy at the Stuttgart consulate to prefer Nazi victims. In any event, despite the questions which the evidence raises as to defendant's claim that he participated in the resistance movement, the government's charge that these claims are false is not supported by clear unequivocal convincing evidence. Therefore, the certificate as to defendant's participation in the resistance (Exh. A-2) has not been established to be false in that respect." (App. C, 199a-120a).

complaint was amended in June 1982 to set forth matters not pertinent to this petition.

On September 28, 1983 the District Court dismissed all of the counts of the complaint, as amended, and held that "the admissible evidence is insufficient to sustain the government's charges that defendant participated in the July and August 1941 killings in Kedainiai" (App. C, 110a). The Third Circuit left undisturbed the District Court's dismissal of the counts which contained the allegations that petitioner participated in atrocities (Counts I, III) and the allegation that he illegally procured his citizenship because of lack of good moral character (Count IV).

The District Court found that had petitioner given the correct information in his visa application form, his visa nevertheless would have been issued since "There is nothing to suggest that his having been born on September 21, 1915 in Reistru would have had any effect whatsoever." (App. C, 119a). The District Court held that there was no reason not to apply the materiality tests of *Chaunt v. United States*, 364 U.S. 350 (1960) to the visa application stage and then made findings under the first *Chaunt* test as well as each of the formulations of the second prong of *Chaunt* as set forth in the various opinions in *Fedorenko v. United States*, 449 U.S. 490 (1981). The District Court found under the first *Chaunt* test that "None of the suppressed facts, if known, would have warranted denial of citizenship" (App. C, 135a), and under the minimal test of the majority in *Fedorenko*, "Disclosure of these facts would not have made defendant ineligible for a visa." (App. C, 135a). Moreover, the District Court found that petitioner's "misrepresentations and concealments would not be deemed material for Section 340(a) purposes under any of the interpretations of the second *Chaunt* test." (*Ibid.*) Finally, the District Court found, "The government's own proofs tend to establish that truthful answers by defendant would *not* have resulted in an investigation." (Emphasis in original text, *ibid.*)

On June 20, 1986 the Third Circuit Court of Appeals, although it expressly acknowledged that "Because we agree with the district court that under the first prong of *Chaunt* the government has not established the requisite materiality, *i.e.* 'that facts were suppressed which, if known, would have warranted denial of citizenship,' felt compelled to 'consider the second prong in the *Chaunt* test and articulate our view of this elusive concept while remaining cognizant of its various interpretations.' " (App. A, 20a-21a). The Third Circuit then found, contrary to the express finding of the District Court, that had the petitioner made truthful statements as to his date and place of birth an investigation "would have ensued," which in all "probability" would have revealed the "disqualifying fact" that the petitioner had not been a "victim of Nazi persecution" and thus held that the Government satisfied the "second prong" of the materiality test of *Chaunt v. United States, supra*, and reversed the judgment of the District Court and remanded for denaturalization proceedings (App. A, 32a-33a).

The Third Circuit concluded that the "second prong" of the *Chaunt* materiality test was met notwithstanding that it noted that, "Country of birth determined eligibility under the quota system. We note that although the defendant misrepresented his place of birth, he did not misrepresent in what country he was born. Therefore, his misrepresentation, in and of itself, did not have impact on his eligibility for a quota visa in general." (App. A, 30a).

The Third Circuit reasoned that a discrepancy in the petitioner's date and place of birth as reflected in supporting documents would have resulted in an investigation of police records reflecting that petitioner had registered as a refugee with German civil authorities and obtained a residence permit (shortly before the French occupied that area) implying he resided in that farming community "without special restrictions" (as did all refugees). From that fact of residency the Third Circuit drew the inference that "This information would tend to discredit the defendant's

claim that he was persecuted by Nazi Germany." (App. A, 32a).

The Third Circuit relied on that thin inference, despite the abundant testimony from witnesses the District Court found credible that petitioner ran the risk of being executed for high treason for his activities in the anti-Nazi Lithuanian resistance thwarting conscription by the German army and with respect to his arranging the escape of himself and eight others from the German S D during flight from the Russian front [Trial testimony of Vydaudas Vidiekunas (Cir. App. pp. 916-918), Youzas Koncius (Cir. App. pp. 1396-1405), Walter Janson (App. C, 114a), and Sophia Kungys (Cir. App. pp. 1250-1252)].

The Third Circuit then gave credence to testimony, expressly rejected and discredited by the District Court (note 7, App. C, 119a-120a), by a former Vice Consul that non-preference immigration quota visas were issued only to victims of Nazi persecution.[2] No such regulation existed at the time petitioner obtained his visa in March 1948 as the Government conceded to the District Court (Cir. App. p. 1488). The actual regulations referred only to the order of priorities for displaced persons and were in evidence before the District Court (App. E, 140a-142a, Exhibit D-34, Federal Register, Dec. 24, 1946). Based on the unsupportable premise of a non-existent regulation recreated from a four decade old memory, the Third Circuit applied a "probability" standard of proof and reached the erroneous conclusion that not being a victim of Nazi persecution was a "disqualifying fact" making the petitioner ineligible for a non-preference immigration quota visa.

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2. The Third Circuit suffered from the inherent disadvantage of not observing the demeanor of Seymour Finger who testified that the requirement of being a victim of Nazi persecution was contained in a regulation the Government attorneys' prepared him with before trial: "This policy was contained in regulations issued by the federal government under which we operated." (Cir. App. p. 583).

REASONS FOR GRANTING THE WRIT

I.

The Third Circuit's interpretation of the second prong of *Chaunt* as permitting a "probability" standard of proof for materiality in a denaturalization case conflicts with decisions and opinions of this Court and other Circuits.

Each denaturalization case since this Court's 1943 decision in *Schneiderman v. United States*, 320 U.S. 118, 125 (1943) has stated that the Government bears the heavy burden of proving its case by clear, unequivocal and convincing evidence which does not leave the issue in doubt. Indeed, this Court as recently as *Fedorenko v. United States*, 449 U.S. 490, 505-06 (1981) stated, "Any less exacting standard would be inconsistent with the importance of the right that is at stake . . ." Unfortunately, three of this Court's opinions in *Fedorenko* set forth conflicting interpretations of the "second prong" of *Chaunt v. United States*, 364 U.S. 350 (1960), which has resulted in unabated confusion among the District Courts and the Circuit Courts of Appeals as to how to apply that heavy burden of proof to the issue of whether a naturalized citizen made "material" misrepresentations or "material" concealments of facts in obtaining his citizenship.

Although the lower courts have consistently applied a "certainty" test to the *Chaunt* formulation that "materiality" is proven by clear, unequivocal and convincing evidence if "facts were suppressed which if known, would have warranted denial of citizenship" (the so-called "first prong"), there has been a lack of consistency bordering on chaos when the lower courts have attempted to wrestle with the "elusive" further formulation in *Chaunt* that "their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship" (sometimes characterized as the

"second prong" of *Chaunt*). At last count there are at least three conflicting tests in the various Circuits, to wit, (1) the "possibility" test of the Fifth and Eleventh Circuits (and the dissent in *Chaunt*) which construes the second prong literally; (2) the "certainty" test of the Tenth Circuit (and a minority of the Third Circuit) which adopts the explication of Justice Blackmun in *Fedorenko v. United States*, 449 U.S. 490, 522-526 (1981) that *Chaunt* contemplated only the rigorous standard that the Government "must prove the existence of disqualifying facts, not simply facts that might lead to hypothesized disqualifying facts"; and (3) the "probability" test of the Third Circuit in the instant case and the Second Circuit which in some amorphous way is more than a mere possibility but less than a certainty. *United States v. Fedorenko*, 597 F. 2d 946 (5th Cir. 1979), *aff'd on other grounds*, 449 U.S. 490 (1981). *United States v. Koziy*, 728 F. 2d 1314 (11th Cir.), *cert. denied*, 105 S. Ct. 130 (1984); *United States v. Sheshtawy*, 714 F. 2d 1038 (10th Cir. 1983); *United States v. Kungys*, ____ F. 2d ____ (3rd Cir. 1986); *United States v. Kowalchuk*, 773 F. 2d 488 (3rd Cir. 1985), *cert. denied*, 106 S. Ct. 1188 (1986); *United States v. Riela*, 337 F. 2d 986 (3rd Cir. 1964); *Maikovskis v. INS*, 773 F. 2d 435 (2nd Cir. 1985); *United States v. Rossi*, 299 F. 2d 650 (9th Cir. 1962); *Madrid-Peraza v. INS*, 292 F. 2d 1297 (9th Cir. 1974); *Kassab v. INS*, 364 F. 2d 806 (6th Cir. 1966); *Langhammer v. Hamilton*, 295 F. 2d 642 (1st Cir. 1961).

Although certiorari was granted in *Fedorenko* presumably to clarify how materiality was to be interpreted in light of *Chaunt*, the majority opinion declined to clarify *Chaunt*. Nevertheless, three Justices addressed the issue of the so-called second prong of *Chaunt* resulting in three different formulations, including raising a doubt as to whether *Chaunt* intended only one test for materiality. In the last twenty-five years *Fedorenko* has been the only denaturalization case in which this Court has granted certiorari and thus the need for reconsideration and definitive

formulation of what constitutes "materiality" remains to be met by this Court.

It is respectfully submitted that this case demonstrates that the possibility test and the probability test for materiality substitute speculation for proof and lead to the "hypothesized disqualifying facts," Justice Blackmun warned against in *Fedorenko*. Thus, although denominated a "probability" test, it severely dilutes the longstanding standard of proof required of the Government before it can deprive a naturalized citizen of his "precious right." It would appear that only the certainty test is consistent with the *Schneiderman* standard of the heavy burden that the Government be required to prove its case by clear, unequivocal and convincing evidence which does not leave the issue in doubt. This is especially important since many recent denaturalization cases are non-jury trials in which the judges are subject to the "hydraulic pressure" of trying what are tantamount to war crimes' cases, as to which United States courts would not otherwise have jurisdiction.[3] Under the circumstances, the Government's burden of proof should not be diluted to less than that required of a simple tort case.

The division among the Circuits, and indeed even within the Third Circuit, is deep and irreconcilable in the absence of a clear and definitive pronouncement by the Supreme Court. The Tenth Circuit in *United States v. Sheshtawy*, 714 F. 2d 1038 (10th Cir. 1983) rejected the mere "possibility" test of the dissent in *Chaunt*, 364 U.S. at 357, and the Fifth Circuit in *Fedorenko*, 597 F. 2d 946, 951-952 (5th Cir. 1979), and concluded that "While there has been substantial disagreement over the meaning of *Chaunt*, its characterizations by Justice Blackmun appear to us to be

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3. The District Court denied petitioner's motion for a jury trial and motion to dismiss for lack of jurisdiction over war crimes. *See* Appellee's Brief to Third Circuit p. 1. The Third Circuit opinion did not consider those issues raised by petitioner.

correct, and until *Chaunt* as thus interpreted has been rejected or overturned by the Supreme Court, we must follow it." 714 F. 2d at 1040. This petition squarely raises this issue which is now ripe for review by this Court since the Third Circuit in the instant case stated, "Our review requires us to examine the second prong of the *Chaunt* test which has not been construed previously by this court nor explained by the Supreme Court." (App. A, 2a).

The District Court in the instant case applied each of the three formulations of *Chaunt* explicated by Justices Blackmun, White and Stevens and found that the Government did not meet its burden of proof under any of them (App. C, 136a-137a). The Third Circuit agreed with the District Court that materiality was not proved with respect to the first prong of *Chaunt* (App. A, 20a), and although it expressly adopted the view of the Tenth Circuit in *Sheshtawy* that the materiality test applies to the false testimony provisions of "illegal procurement" under 8 U.S.C. § 1101(f)(6), it nevertheless refused to follow its own opinion in *United States v. Riela,* 337 F. 2d 986 (3rd Cir. 1964),[4] which Justice Blackmun cited to in *Fedorenko* as the source of one of the conflicting interpretations of the *Chaunt* materiality standard, 449 U.S. at 521, n.4 (App. A, 27a). Instead, the Third Circuit herein adopted the "probability" standard of the Second Circuit in *Maikovskis v. INS*, 773 F. 2d 435 (2nd Cir. 1985). In adopting the "probability" test, the Third Circuit acknowledged, "We note that the U. S. Court of Appeals for the Tenth Circuit reached

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4. Chief Judge Aldisert, who wrote the majority opinion in the first *Kowalchuk* opinion of the Third Circuit (744 F. 2d 301, publication withdrawn) and a dissent in the 8 to 4 *en banc* opinion, concluded that the Third Circuit was bound by the "certainty" test of *Riela* in stating, "Other courts, including this one, require more. We require the government to prove not only that, had the correct information been available, an investigation would have been undertaken, but that it would have uncovered facts warranting visa denial. *United States v. Riela*, 337 F. 2d 986, 989 (3rd Cir. 1964)." *United States v. Kowalchuk*, 773 F. 2d 488, 515 (3rd Cir. 1985).

a different result when faced with this issue. In *United States v. Sheshtawy*, 714 F. 2d 1038 (10th Cir. 1983), the court adopted Justice Blackmun's interpretation of *Chaunt* (as explicated in *Fedorenko*) and therefore effectively held that the second prong does not contain a separate test." (App. A, 18a-19a).

As analyzed by Chief Judge Aldisert of the Third Circuit, "The issue comes down to this: If this court, or any court, including the Supreme Court, adopts the literal meaning of one word 'might,' as contained in *Chaunt*, then one word will wipe out an entire galaxy of settled case law." *United States v. Kowalchuk*, 773 F. 2d 488, 515 (3rd Cir. 1985).

In view of the above, it seems abundantly clear that petitioner's case directly presents an intolerable conflict among decisions of the lower courts as set forth in the certiorari guidelines of Rules 17.1(a) and (c) of the Rules of the Supreme Court of the United States and that the time is now ripe for this intrinsically important issue affecting the "precious right of citizenship" to be addressed by the Supreme Court.

II.

The decision below as to what constitutes "materiality" at the denaturalization and visa application stages raises important and unresolved problems affecting the "precious right of citizenship."

This case is intrinsically important since it directly implicates what this Court has referred to as "nothing less than the right to have rights." *Perez v. Brownell*, 356 U.S. 44, 64 (1958). For this petitioner, as well as thousands of other naturalized citizens who emigrated from countries behind the Iron Curtain, the consequences of being denaturalized and deported to the Soviet Union or one of its satellites are not only loss of freedom, but also loss of life itself, since the Soviet Union regards flight from

the Soviet Union during the "Great Patriotic War" (World War II) as an act of treason punishable by death. As reported in the New York Times edition of June 20, 1986, Fyodor D. Fedorenko, who was the petitioner before this Court in *Fedorenko v. United States, supra*, was sentenced to death for treason after being deported to the Soviet Union. Thus, these denaturalization cases, instituted by the Office of Special Investigation of the Criminal Division of the U. S. Justice Department ("the OSI") against naturalized citizens from the Soviet Union and the Eastern bloc countries based on accusations of war crimes emanating from Soviet sources,[5] are tantamount to capital cases.

It is beyond mere irony that the petitioner successfully defended himself against allegations of having committed atrocities during World War II and yet could be denaturalized and deported to the Soviet Union and executed as a consequence of the innocuous conduct of misrepresenting his date and place of birth and because of the happenstance that he resided in the Third Circuit instead of the Tenth Circuit. He, along with the thousands of others, changed his date and place of birth on his temporary identification card to make himself older and thereby avoid conscription as an officer into the German armed forces.[6] He, along with thousands of refugees from the Soviet bloc countries, fled from the approaching Red Army rather than being subjected

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5. As of November 1985 there were more than 300 investigations and prosecutions being pursued by the OSI against alleged "Nazi war criminals," the jurisdiction for which is based on U. S. immigration laws. *See National Law Journal*, Nov. 25, 1985, p. 9, col. 1.

6. V. Vidiekunas testified that the Lithuanian resistance obtained temporary identification cards from underground people at Kaunas City Hall with incorrect dates and places of birth to avoid mobilization by the Germans (Cir. App. p. 906). J. Koncius testified the principal of his school in Lithuania backdated the male students' dates of birth to help them avoid conscription into the German Army (Cir. App. p. 1409).

to an equally odious totalitarian regime.[7] He, along with numerous others, took steps to avoid being expelled from refugee camps and being repatriated to the Soviet Union as the result of "screenings" by Soviet representatives and Communist sympathizers in UNRRA (Cir. App. pp. 912, 1755-56). It is in this connection that petitioner and other Lithuanian refugees preserved their freedom by obtaining a certificate from the Ex-Political Prisoners Committee that he was active in the Lithuanian anti-Nazi resistance movement (Exh. A-2). Now, for the first time in any court, the Third Circuit has established the precedent that if the Government can prove that it is "probable" that a post World War II refugee was not a victim of Nazi persecution, his citizenship can be revoked, his visa invalidated, and he can be deported if there was also any error, even an immaterial error, on his immigration papers.

This dangerous precedent of applying a mere "probability" test of "materiality" is even more deplorable because it is based on the unwarranted inference, during an appellate court "plenary" review of an unalleged matter, that the obtaining by a refugee of a residence permit at the ending stage of a war "tended" to show that the refugee was not a victim of Nazi persecution. From that thinly inferred mere tendency, the Third Circuit reached the conclusion that it was "probable" that an investigation might

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7. In its Constitution, the International Refugee Organization ("IRO"), a specialized agency related by agreement to the United Nations, recognized the plight of refugees fleeing from the Russian Front in providing, "the term 'refugee' also applies to a person, other than a displaced person as defined in section B of this Annex, who is outside of his country of nationality or former habitual residence, and who, as a result of events subsequent to the outbreak of the Second World War, is unable or unwilling to avail himself of the protection of the Government of his country of nationality or former nationality." Section A.1., Annex I to the IRO Constitution, signed by the United States on December 16, 1946. That definition was incorporated by reference into section 2(b) of the Displaced Persons Act of 1948.

have disclosed the hypothesized, but non-existent, disqualification that such a refugee was ineligible for a non-preference immigration quota visa.

This case thus illustrates the compelling importance of clarifying that "materiality," however formulated, must be proved by clear, convincing, and unequivocal evidence which does not leave the issue in doubt before any citizen can be denaturalized. To not grant certiorari would result in an unreversed appellate precedent which imparts an extraordinary fragility to citizenship acquired by naturalization. The OSI now has the virtually unchecked discretion to obtain revocation of citizenship based upon speculation combined with some immaterial, decades old error when it chooses to react to belated disclosures and criticisms by the Soviet Union.

III.

The decision below violated the Fifth Amendment and Rule 52(a) of the F. R. Civ. P. and constitutes such an arbitrary threat to citizenship by the manner in which it imposed its admittedly elusive "probability" standard that this Court should exercise its power of supervision.

In addition to adopting a diluted test for "materiality," the Third Circuit herein applied its "probability" test in a manner which "so far departed from the accepted and usual course of proceedings" as to "call for an exercise of this Court's power of supervision." [Sup. Ct. R. 17.1(a)]. After giving proper deference to the District Court's findings that an incorrect date and place of birth on an application for an immigration quota visa based on a correct country of origin were not "material" under the first prong of *Chaunt* (App. A, 20a), the Third Circuit made its own finding that it was "unrebutted" that discrepancies would have resulted in an investigation

21a-22a), despite the District Court's express finding that "The government's own proofs tend to establish that truthful answers by defendant would *not* have resulted in an investigation." (App. C, 136a) (emphasis in original).

Under Rule 52(a) of the Federal Rules of Civil Procedure the Third Circuit was bound by the District Court's finding that no investigation would have resulted unless that finding was "clearly erroneous." Indeed, the Third Circuit acknowledged that, "Insofar as our review involves findings of fact made by the district court after a non-jury trial, our review is limited to the clearly erroneous standard." (App. A, 3a). The Third Circuit then erroneously proceeded to give "plenary review" to the factual elements of (a) whether an investigation would have ensued; and (b) whether, under its test, such an investigation "probably" would have discovered a hypothesized "disqualifying fact" separate and apart from the incorrect date and place of birth. While the "ultimate" fact of "materiality" may be a mixed question of law and fact that requires the application of legal principles to the historical facts of a case, the factual component of whether *an investigation would have ensued* as bearing on the ultimate fact (materiality) is subject to review only under the clearly erroneous rule. *Pullman-Standard v. Swint*, 446 U.S. 273, 286-287, n.16 (1982). The Third Circuit had previously been clear as to the standard of review as to ultimate facts, stating, "It is the responsibility of an appellate court to accept the ultimate factual determination of the fact finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supporting evidentiary data." *Krasnov v. Dinan*, 465 F. 2d 1298, 1302 (3rd Cir. 1972). Here the District Court reviewed the evidence, including the testimony of a former Vice Consul presented by the Government, and made the subsidiary finding that "Certainly there was nothing which would excite suspicion in the fact that defendant was born in Reistru in the year 1915."

(App. C, 136a). That finding was obviously not "clearly erroneous."

At the trial the Government called as its witness Seymour Finger, who as a Vice Consul had processed visas at the United States Consulate in Stuttgart, Germany for eleven months ending in February 1947. Former Vice Consul Finger did not interview petitioner with respect to his application for a visa which was issued in March 1948 and had never even examined his immigration file except in connection with his trial preparation (Cir. App. p. 570). Mr. Finger's testimony in 1983 as to what he would have done with respect to petitioner's application for a visa had he had doubts as to whether he was a victim of Nazi persecution and had he processed it in 1947 is at best retrospective conjecture based upon a faulty memory. No Vice Consul had the right to impose his own subjective standard or fashion a new criterion which was not embodied in the regulations governing the issuance of non-preference immigration quota visas. Congress did not delegate any authority to Vice Consuls to make informal policies not contained in the published regulations or presidential directives. President Truman's Statement and Directive of December 22, 1945 states, "Our major task is to facilitate the entry into the United States of displaced persons and refugees still in Europe." (App. F, 147a).

President Truman's Directive of December 22, 1945 remained operative for displaced persons and refugees receiving visas regardless of race, religion or nationality until the June 25, 1948 enactment of the Displaced Person's Act of 1948, which defined "eligible displaced person" in Section 2(c) to "embrace three general classes: (1) persons who were brought into Germany by the Nazis as forced laborers; (2) persons who fled to the west before the advancing Russian armies, and (3) persons, chiefly of Jewish origin, who fled from Germany or Austria during the Nazi regime and who have returned but who have not been resettled."

Displaced Persons In Europe, Report of the Senate Committee on the Judiciary, Report No. 950, p. 54. The phrase "victims of Nazi persecution" is contained in the IRO Constitution definition category 3: "the term 'refugee' also applies to persons who, having resided in Germany or Austria, and being of Jewish origin or foreigners or stateless persons, were victims of Nazi persecution and were detained in, or were obliged to flee from, and were subsequently returned to, one of those countries as a result of enemy action, or of war circumstances, and have not yet been firmly resettled therein." Part I, Section A.3, Annex I to IRO Constitution. That IRO partial definition of refugee was incorporated into Section 2(b), "Displaced person" and Section 2(c) "Eligible displaced person" of the Displaced Person Act of 1948. Petitioner, however, was issued his non preference immigration quota visa under the quota for Lithuania in March, 1948 prior to the June 1948 enactment of the Displaced Person's Act of 1948. Even if Seymour Finger issued visas under the German and Austrian quotas only to victims of Nazi persecution, neither he, nor any other Vice Consul, could have excluded from the issuance of visas under the Lithuanian quota, refugees, such as petitioner, who fled to the west before the advancing Russian armies.[8]

Mr. Finger did concede, however, that out of the 1,500 applications he processed, more than 1,000 did not have authentic birth certificates (Cir. App. p. 888), and that while he could direct

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8. It would have been a clear violation of visa procedure for Vice Counsel Finger to have given preference to displaced persons who were victims of Nazi persecution to the exclusion of refugees from the Russian front. The Immigration Visa Procedure then in effect provided: "Under no circumstances should an applicant for a quota immigration visa be issued such a visa out of his proper turn with other qualified applicants in the same category, as this would have the effect of according the applicant an unauthorized preference over other qualified applicants having earlier priority." Note 119, 22 CFR 61.301.

inquiries to the displaced persons' camps, in fact he "rarely" did so (Cir. App. p. 576). Out of 30 to 35 Lithuanians' applications for visas processed by him, he made 2 or 3 inquiries to the Lithuanian representatives in the displaced persons' camps, although approximately one third of the Lithuanian applicants had certificates similar to petitioner's from the Ex-Political Prisoner's Committee (Cir. App. p. 577).

There was no need for the Third Circuit to speculate as to what an inquiry by a Vice Consul to the Lithuanian camp representative would have disclosed, since Vydaudas Vidiekunas, who signed petitioner's certificate (Exh. A-2) as Secretary of the Lithuanian Ex-Political Prisoner's Committee testified at the trial below. The District Judge, who personally interrogated the witness, noted in his findings of fact, "Vidiekunas testified, truthfully I am convinced." (App. C, 115a). Vidiekunas, a former Lithuanian lawyer, testified that after being liberated by the Allies, the Lithuanian refugees in Germany organized a society of former prisoners from Nazi camps and prisons and that he was elected Secretary. In order to protect Lithuanian refugees from being ousted from the Baltic camps as a result of "screenings" by Soviet representatives of UNRRA, his committee established a procedure for issuing certificates to Lithuanian refugees upon written proof from two witnesses that the refugee was active in the Lithuanian resistance against the Nazis (Cir. App. pp. 911-914). The petitioner applied for his certificate on February 25, 1946—11 months before he even applied for a visa and the certificate was granted on June 18, 1946, after the committee received testimony from two witnesses that petitioner, and a fellow prisonmate of Vidiekunas, organized an underground newspaper with stolen printing presses hidden in old forts outside Kaunas[9] (Cir. App. pp. 915-917).

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9. The District Court found "some independent support for defendant's claim he performed work for the resistance" in Janson's testimony that petitioner distributed to him underground newspapers urging resistance to German mobilization (App. C, 114a).

Vidiekunas further testified that petitioner's conduct in so assisting the Lithuanian resistance subjected him to the risk of being executed for high treason by the Nazis. Petitioner was one of less than 200 persons who were issued the certificate by his committee and the purpose of issuing the certificate was not to assist Lithuanians in obtaining visas to the United States (Cir. App. pp. 918-919). Vidiekunas never heard that immigration quota visas were restricted to persons who were victims of Nazi persecution (Cir. App. p. 923).

After making its *de novo* finding of fact that an investigation would have ensued as a result of the discrepancy between petitioner's correct date and place of birth in some local records[10] and the incorrect date and place of birth on the visa application, the Third Circuit made the additional finding that petitioner received a residence permit to reside in the rural community of Poltringen "without special conditions." From that residence permit, the Third Circuit drew the unsupportable inference that "This information would tend to discredit the defendant's claim that he was persecuted by Nazi Germany." (App. A, 32a). Since all refugees had to register with local authorities and thereby obtained residence permits "without special conditions"[11] (other

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10. The Third Circuit's review of the record was faulty in asserting that petitioner gave his correct date of birth to the Tuebingen authorities under the Third Reich and an incorrect date of birth to the Tuebingen authorities during the Allied occupation. Government Exh. J-13 is the original entry document, the Register of Residents from the Office of the Mayor, Municipality of Ammerbach, Tuebingen District for the Community of Poltringen and it records the same incorrect place of birth and month of October and year of 1913 set forth in petitioner's Lithuanian passport and visa application. Indeed, petitioner's correct date of birth is reflected in the post Allied occupation of Poltringen record of Oct. 1, 1945 as set forth in Exh. J-3.

11. The residence permits issued at that time by the Provincial Council for Tuebingen to foreign refugees were simple identification documents which did not even contain the words "without special restrictions." (App. H. 159a).

than prisoners of war) (Cir. App. p. 1031), the only supportable inference from the residence permit is that petitioner was a refugee who resided in that community.

The residence permit is irrelevant to whether at a prior time and place petitioner was active in the anti-Nazi resistance in Lithuania as corroborated by two trial witnesses. Moreover, the petitioner truthfully disclosed on his visa application his residence in Poltringen (a community in Tuebingen District) commencing in October 1944 (Trial Exhibit A-3). Indeed, his wife's INS "A" file contained the Tuebingen residence permit issued by that Provincial Council to foreign refugees before that community was liberated by the Allies (App. H). Those historical facts were obviously not a matter of concern to the Vice Consul who processed together petitioner's and his wife's visa applications. Nor were residence permits issued to refugees by provincial councils before the end of the war an impediment to issuing a visa for petitioner, his wife, or any other refugee.

Moreover, the presumption is that the Vice Consul followed the normal procedures required by the regulations and either was satisfied with the Tuebingen residence permit in the file or, in fact checked the municipal records in Tuebingen District for the periods before and after the Allied occupation. Presumably, the Tuebingen police would have confirmed that petitioner and his wife were issued residence permits since they were once registered there. Evidently the Vice Consul was more concerned that the police there had no record of bad conduct, than whether there were incorrect dates of birth in the records of a rural community. [There were numerous errors on the Tuebingen records including the post Allied record showing that petitioner's two brothers, Felix and Stanislaus, were born within five months of each other (Exh. J-6).] There is nothing in the regulations or the presidential directive that indicates the Vice Consul also was

required to determine if the petitioner was a victim of Nazi persecution.[12]

As noted by Chief Judge Aldisert of the Third Circuit in *Kowalchuk*, "In Germany, the state had ceased to exist. A mass of civilians, freed persons and the first waves of 13 million refugees from Eastern Europe wandered the country." 773 F. 2d at 500. The District Court found, "Defendant's flight from Lithuania and eventual settlement in Germany is best described by Youzas Koncius, who for the last 27 years has been a high school teacher in Illinois and whose testimony has the ring of complete truthfulness." (App. C, 115a). Koncius testified that he left Lithuania with petitioner and his family of eight in horses and wagons as shells were exploding on the farm of petitioner's father, that they proceeded to the nearby German border along with long columns of other refugees, that they were stopped by the German S D and forced to dig ditches at gunpoint until petitioner organized an escape, that they ultimately got as far west as possible to where the Allies would come, that shelters were established in Tuebingen County by local civil authorities, including the Catholic farm community of Poltringen, where they along with Allied prisoners of war, assisted farmers, and that there were thousands of refugees in camps in Germany (Cir. App. pp. 1396-1406).

Nevertheless, the Third Circuit ignored the findings of the District Court based on the credible testimony of Koncius,

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12. Former Vice Consul Frank Schilling who processed petitioner's visa application was asked by petitioner's counsel: "Let me ask you rather pointedly, whether or not in order to gain an immigration quota visa you had to have been in fact a victim of Nazi persecution?" and he answered: "No. That I don't remember." (Trial Exh. 38A). That Trial Exhibit was not included in the Appendix before the Third Circuit because the Government did not even raise the issue of any such requirement in its required Statement of the Issues before the Third Circuit in its Civil Appeal Information Statement, which is relied upon when preparing the Appendix in the Third Circuit.

Vidiekunas and Janson and drew its own inference from a residence permit to live as a refugee in a rural community shortly before the Allies liberated the area, that it would "tend to discredit" petitioner's claim he was "persecuted by the Nazis."[13] Proceeding from that unwarranted inference, the Third Circuit reached the false conclusion that petitioner was not eligible for a non-preference immigration quota visa, having accepted the unsupported and unsupportable contention of Seymour Finger, based solely on a recreated 40 year old defective memory, that only victims of Nazi persecution were eligible for non-preference immigration quota visas. Thus, the absence of being a "victim of Nazi persecution" was perceived by the Third Circuit as a disqualifying fact" which somehow transubstantiated petitioner's immaterial date and place of birth under the "first prong" of *Chaunt* into a "material" misrepresentation of date and place of birth under the "probability" test for the second prong of *Chaunt* (App. A, 32a-33a). In various criminal contexts (to which these cases bear a closer resemblance than a common law civil case) this Court has repeatedly held that the use of an administrative presumption or an inference (such as from issuance of the residence permit "without special restrictions") to eliminate an element of the prosecution's proof violates due process. *See Francis v. Franklin*, 105 S. Ct. 1965 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979); and *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

The District Court expressly found that Seymour Finger was "in error" in contending that the regulations required that a visa applicant had to prove he was a victim of Nazi persecution to be eligible for a non-preference immigration quota visa. There

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13. The evidence as to whether petitioner was a victim of Nazi persecution was presented on the issue of the credibility of petitioner and other witnesses and as to whether his anti-Nazi activities made it unlikely he would have collaborated in Nazi atrocities.

is nothing on the visa application to even suggest any such requirement. The former Vice Consul who actually processed petitioner's visa application had no recollection of any such requirement (Defendant's Trial Exh. 38A). The regulations, as published in the Federal Register on December 24, 1946 pp. 14611-14612, F.R. Doc. 46-21860, 22 CFR § 61.313(a)(3), contain no such requirement (App. E, 140a-141a), although they do indicate an order of *priority* for displaced persons. [Petitioner who fit in priority category 3(i)(c), displaced persons covered by the President's Directive of December 22, 1945, had to wait 14 months for his nonpreference visa. Note 131, 11 F.R. 14611).] The Government, when challenged at the trial to produce such a regulation, admitted it could not produce any regulation requiring such a displaced person to be a victim of Nazi persecution (Cir. App. p. 1488).[14] The Statement and Directive of President Truman of December 22, 1945 (App. F, 143a-151a) referred to in the regulations, makes no reference to any requirement that displaced persons or refugees had to be victims of Nazi persecution. To the contrary it expressly states, "This Government should take every possible measure to facilitate full immigration to the United States under *existing* quota law." (emphasis added) (148a).

Neither the complaint, nor the amended complaint, nor the statutorily required affidavit of good cause in support of those complaints, nor the pre-trial order limiting proof, alleges either that petitioner misrepresented that he was a victim of Nazi

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14. When trial counsel for petitioner proffered the State Department Circular of July 8, 1947 (App. G, 152a-155a), it was rejected by the District Court on the grounds, "It is of marginal relevance." In response to trial counsel's argument, "Its only of marginal relevance if Your Honor accepts the argument that there was no such regulation about being a victim of Nazi persecution. Court: Nobody has shown it to me yet. Mr. Lynch [OSI trial attorney] have you shown me such a regulation? Mr. Lynch: No, sir." (Cir. App. p. 1488). (brackets added).

persecution during either the visa or naturalization proceeding, or that the lack of being a victim of Nazi persecution was a disqualifying fact, making the petitioner ineligible for a nonpreference immigration quota visa. Nor did the Government's Civil Appeal Information Statement, Statement of Issues, or Briefs on Appeal raise those issues. The Third Circuit's faulty *de novo* fact finding and issue creation without notice to the petitioner violate his right to due process under the Fifth Amendment. *See Dunn v. United States*, 442 U.S. 100 (1979).

Unlike the Third Circuit in the instant case, this Court has refused to consider matters outside the complaint in denaturalization cases. The Government's proof in a denaturalization proceeding is limited, as in a criminal proceeding, to matters charged in the complaint, *Schneiderman v. United States*, 320 U.S. 118, 160 (1943). There could be no clearer violation of due process of law than here where the Third Circuit has injected its own issue and developed its own false factual predicate without affording petitioner the opportunity to even put into the Trial Exhibit's Appendix on appeal exhibits which at the time of designation had no relevance to the issues the Government listed in its Civil Appeal Information Statement. Thus, the Trial Exhibits volumes of the Circuit Appendix do not contain Exhibit 38-D, the transcript of former Vice Consul Frank Schilling who actually processed petitioner and his wife's visa applications (Mrs. Kungys' file contained her residence permit from Tuebingen prior to the Allied occupation) and Exh. 54-D for identification, which is the Department of State circular, dated July 8, 1947, "Information Concerning Immigration Into the United States From Germany and Austria" showing that visas were issued to "displaced persons" and containing no requirement of being a victim of Nazi persecution (App. G). Moreover, even as to the Third Circuit's straw man issue, the Circuit Appendix did not include the deposition testimony of Walter Jensen (Dep. 40, 44-48, 54) which the trial court found was "some support

for defendant's claim he performed work for the resistance." (App. C, 114a).

That the hypothesized "Nazi persecution" requirement for a visa is a bogus revision of historical fact is further demonstrated by the District Court's review and analysis in *United States v. Kairys*, 600 F. Supp. 1254 (N.D. Ill. 1984), *aff'd*, 782 F. 2d 1374 (7th Cir. 1986), where it is noted that even "a German who voluntarily served in such units as the Waffen SS was eligible to be a quota immigrant." (*Id.* at 1266, n.5.)

Moreover, it cannot be argued that at the time petitioner filed his petition for naturalization in 1953 that he was required to show he was a victim of Nazi persecution. No speculative inferences can transform the inconsequential and correctable misstatements as to his date and place of birth on his naturalization petition into material, disqualifying facts under any formulation of *Chaunt*. Indeed, it is expressly noted on his 1953 petition for naturalization "investigation waived" (Trial Exh. A-11), because as the INS examiner explained field investigations were routinely waived, "Where in my opinion a field investigation would have no value, that the possibility of producing adverse information was negligible." (Trial Exhibit, p. 1132)

In 1952, the Displaced Persons Act was amended to require that the excluding misrepresentation by an alien in procuring his visa must be "by willfully misrepresenting a material fact." Immigration and Nationality Act of 1952, § 212(a)(19), 8 U.S.C. § 1182(a)(19) (1982). As noted by the dissenting judge who wrote the majority *en banc* opinion in *United States v. Kowalchuk*, "The reason for the amendment is stated in H.R. Rep. No. 1365, 82nd Cong. 2d sess. reprinted in 1952 U.S. Code Cong. & Admin. News 1653, 1704 and is based on the belief that misrepresentations having no bearing on the issues involved, such as place of birth or personal data statements often made under duress to avoid repatriation,

should not serve as a basis for exclusion." 744 F. 2d at ____. These are "inconsequential nondisclosures that the Congress and the courts have chosen to absolve." (*Ibid.* citing to *Fedorenko*.)

If an incorrect date and place of birth are not material, such as to warrant revoking naturalized citizenship under *Chaunt*; and if an incorrect date and place of birth in a visa application are not material, such as to invalidate a visa under the majority opinion and Justice Blackmun's opinion in *Fedorenko*, then the Third Circuit should not be permitted to transubstantiate the immaterial into the material by creating a diluted standard it denominates as a "probability" test at the visa application stage. If anything, since the visa application stage is even more remote in time and even more subject to unsound conjecture, and hypothesis, there is an even greater need for a certainty test for materiality at the visa application stage.

The admonition of Chief Judge Aldisert to his brethren on the Third Circuit in his dissenting opinion in the *en banc United States v. Kowalchuk* decision is especially apt:

> "I quickly recognize that it is always difficult to reconstruct what actually happened at any point in history, and more difficult still when the events of consequence occurred during totally devastating wartime conditions, in enemy territory, over forty years ago. Indeed, this realization lies at the core of the due process issues . . . In all cases, an appellate court should adhere closely to the district court's determination of witness credibility; under these special conditions, this requirement assumes *a fortiori* proportions." 773 F. 2d at 499.

The manner in which the Third Circuit applied its so-called "probability" test for the second prong of *Chaunt* in this case,

is a clear illustration as to why this Court should not permit a dilution of the clear, unequivocal and convincing burden of proof on all the issues before a citizen can be denaturalized. It is especially important because only a certainty test can prevent a miscarriage of justice when judges have to apply the law under the hydraulic pressure of the gruesome allegations which accompany these "material" misrepresentations cases. Indeed, the Third Circuit's opinion shows an unnecessary preoccupation with the Soviet evidence on atrocities, although it leaves undisturbed the District Court's holding that the Soviet evidence was unreliable and inadmissible.

Under the rubric of a "probability" test for materiality, the Third Circuit has reached a legal conclusion so totally devoid of evidentiary support as to amount to no evidence at all; and it has done it in a way so detached from the allegations in the pleadings and the controlling standard of review of the District Court's findings as to render this revocation of citizenship an unconstitutional deprivation of due process of law. What the Third Circuit did in this case not only seriously affects the fairness, integrity and public reputation of our public proceedings, but also engrafts a "probability" test on the standard of proof for materiality which will result in "great mischief." *Anderson v. Liberty Lobby*, ____ U.S. ____ (1986).

More than 300 investigations and prosecutions by the OSI based on allegations of atrocities emanating from Soviet sources may be impacted by this Court's clarification of what constitutes the test for "materiality" at both the naturalization and visa application stages of citizenship proceedings. They deserve a uniform standard of justice, which precludes hypothesized facts.

CONCLUSION

For the various reasons set forth herein, this petition for a writ of certiorari should be granted. If the petitioner is correct that the Third Circuit violated petitioner's constitutional right to due process of law by making *de novo* findings of fact as to unalleged matters in violation of Rule 52(a) of the Federal Rules of Civil Procedure and contrary to the findings of fact of the District Court and the record of evidence, then the judgment of the Third Circuit should be reversed and the matter remanded to the District Court for reinstatement of its judgment dismissing the complaint.

Respectfully submitted,

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